IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 22, 2000 Session

STATE OF TENNESSEE v. JERRY A. MURRELL

Direct Appeal from the Circuit Court for Blount County
No. C-11500 D. Kelly Thomas, Jr., Judge

No. E2000-00693-CCA-R3-CD
January 8, 2001

The defendant, Jerry A. Murrell, pled guilty to possession of marijuana with intent to sell or deliver. See Tenn. Code Ann. § 39-17-417(g)(1). The trial court imposed a sentence of 90 days in the county jail followed by 15 months in Community Corrections. In this appeal, the defendant asserts that the trial court erred by failing to suppress evidence obtained pursuant to a search warrant based upon an insufficient affidavit. Because the defendant failed to properly certify this question for review, the appeal is dismissed.

Tenn. R. App. P. 3; Appeal Dismissed.

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOE G. RILEY, JJ., joined.

Joe Costner and Andy Long, Maryville, Tennessee, for the appellant, Jerry A. Murrell.

Paul G. Summers, Attorney General & Reporter; R. Stephen Jobe, Assistant Attorney General; and John Bobo, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On August 28, 1998, Blount County Sheriff's Deputy Ron Talbott, who had been investigating Corner Pocket Billiards for possible illegal drug activity, sought the issuance of a search warrant based upon the following affidavit:

> Within the past seventy two hours Affiant has spoken to one of the informants who has seen marijuana being sold inside the business. These informants are all familiar with what marijuana looks like, and how it is packaged.

There were no other temporal references contained in the affidavit.

Later, Deputy Talbott executed the search warrant at Corner Pocket Billiards in Maryville, Tennessee. The officer found the defendant, a part owner of the business, in possession of a plastic bag of marijuana and nearly $1,500 in cash. A metal box containing several bags of marijuana, money, hand scales, and payment books was found on a table underneath the front counter of the business.

The defendant, who was indicted for possession of marijuana with intent to sell or deliver, filed a motion to suppress the evidence seized during the search, arguing that the information contained in the underlying affidavit was stale and, therefore, inadequate to support the issuance of a warrant. See State v. Longstreet, 619 S.W.2d 97 (Tenn. 1981); State v. Baker, 625 S.W.2d 724 (Tenn. Crim. App. 1981). When the trial court denied the motion, the defendant entered into a plea agreement with the state, specifically reserving appeal on a certified question of law. The state consented to the reservation as dispositive of the case. Pursuant to the agreement, the defendant asked the trial court to accept his plea of guilty, again specifically reserving the certified question of law for appeal, which was framed as follows:

> Whether the search warrant and accompanying affidavit, which contained the following language, . . . provided the issuing judge or magistrate with sufficient dates and times during which the facts in question occurred so that the judge would know whether the facts are too stale to establish probable cause at the time the search warrant was issued.

On September 13, 1999, the trial court accepted the plea of guilt and specifically included the question of law for appeal in the order. Six weeks later, the trial court sentenced the defendant to 18 months, with 90 days to be served in the county jail and the remaining 15 months to be served in Community Corrections. The judgment entered made no reference to the certified question.

The defendant contends in this appeal that the evidence seized by the Blount County Sheriff's Department pursuant to the search warrant obtained by Deputy Talbott should have been suppressed because the affidavit merely provided that the officer had spoken to the informant "within the past seventy[-]two hours" and contained no information regarding the date of the illegal activity. Because, however, the defendant failed to certify the question within the strict guidelines of the law, this court may not address the substantive issue.

Rule 37 of the Tennessee Rules of Criminal Procedure provides that an appeal lies from a plea of guilty or nolo contendere if:

> (i) defendant entered into a plea agreement under Rule 11(e) but explicitly reserved with the consent of the State and of the court the right to appeal a certified question of law that is dispositive of the case; or

* * *

> (iv) defendant explicitly reserved with the consent of the court the right to appeal a certified question of law that is dispositive of the case.

Tenn. R. Crim. P. 37(b)(2)(i), (iv).

In State v. Preston, our supreme court established the procedural conditions necessary for consideration of the merits of a question of law certified pursuant to Rule 37:

> This is an appropriate time for this Court to make explicit to the bench and bar exactly what the appellate courts will hereafter require as prerequisites to the consideration of the merits of a question of law certified pursuant to Tenn. R. Crim. P. 37(b)(2)(i) or (iv). Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. For example, where questions of law involve the validity of searches and the admissibility of statements and confessions, etc., the reasons relied upon by defendant in the trial court at the suppression hearing must be identified in the statement of the certified question of law and review by the appellate courts will be limited to those passed upon by the trial judge and stated in the certified question, absent a constitutional requirement otherwise. Without an explicit statement of the certified question, neither the defendant, the State nor the trial judge can make a meaningful determination of whether the issue sought to be reviewed is dispositive of the case. Most of the reported and unreported cases seeking the limited appellate review pursuant to Tenn. R. Crim. P. 37 have been dismissed because the certified question was not dispositive. Also, the order must state that the certified question was expressly reserved as part of a plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the case. Of course, the burden is on defendant to see that these prerequisites are in the final order and that the record brought to the appellate courts contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the

> question certified. No issue beyond the scope of the certified question will be considered.

759 S.W.2d 647 (Tenn. 1988) (emphasis added).

In State v. Pendergrass, 937 S.W.2d 834 (Tenn. 1996), the defendant, who pled guilty to charges of possession of marijuana with intent to sell, possession of cocaine, and possession of drug paraphernalia, attempted to certify for appeal an evidentiary question arising from the search of her residence. Although the trial court entered a post-judgment order attempting to certify the question, our supreme court, emphasizing the necessity of strict adherence to the Preston guidelines, held that the failure to include the certified question in the judgments was fatal:

> Contrary to the explicit and unambiguous requirements of Preston, the three January 15, 1993 final judgments in this case, from which the time for a Tenn. R. App. P. 3 appeal began to run, make no reference at all to a reservation of a dispositive question of law for appellate review. Moreover, the judgments do not contain an identification of the scope and limits of the legal issue reserved as required. Nor do the judgments contain any statement in satisfaction of the reservation requirements, nor do they contain any statement that the question is dispositive, all explicitly required by Preston. Finally, these judgments do not refer to or incorporate any other independent document which would satisfy the Preston requirements. Accordingly, as the Court of Criminal Appeals found, the judgments entered on January 15, 1993, completely fail to comply with Rule 37 and Preston.

Id. at 837. In State v. Irwin, 962 S.W.2d 477 (Tenn. 1998), our high court again required specific compliance with the Preston rule, holding that the merits of the appeal could not be reached where the defendant failed to properly reserve the question of law.

In this case, the defendant, the state, and the trial court all clearly intended that this court address the merits of the defendant's question of law. The plea agreement and the order accepting the guilty plea document that. The state and the trial court concurred that the question of law was dispositive of the case. Nevertheless, our supreme court has decided that the failure to reserve the question in the final judgment is fatal. The procedural mandate in State v. Preston provides for no exceptions.

In the recent words of Judge Jerry L. Smith, writing for another panel of this court in a similar case:

> We are not unsympathetic to the appellant's inevitable frustration with this Court's dismissal of his appeal despite his efforts

> [to properly certify the question]. However, the holding in Preston created a bright-line rule from which this Court may not depart. . . . Because the final judgment does not contain a statement of the certified question of law, nor does the judgement refer to an independent document which would satisfy the requirements of Preston, we are left with no choice but to dismiss the appeal.

State v. Andrea McCraw, No. 03C01-9903-CR-00106 (Tenn. Crim. App., at Knoxville, March 7, 2000).

Accordingly, this appeal is dismissed.

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GARY R. WADE, PRESIDING JUDGE